Supreme Court, U.S.
FILED
SEP 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-281

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BERNARD H. GOLDSTEIN,
Petitioner

v.

HENRY CRAWFORD, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM OF HENRY CRAWFORD, ET AL., IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly allowed an employee benefit plan to offset a trustee's interest in the plan in satisfaction of judgments against the trustee for embezzlement of plan assets.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 815 F.2d 117.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1987, and a petition for rehearing was denied on May 21, 1987. The petition for a writ of certiorari was filed on August 18, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, is attached as App. A-1.

STATEMENT

The undisputed record reveals that this action was brought by former employees of LaBoucherie Bernard, Ltd. and its predecessor in interest, District Hotel Supply Inc. (collectively the "Company"), who were participants in the District Hotel Supply, Inc. Profit Sharing Plan. (Pet. App. 5a). The Plan was created in 1962 as a trust to provide retirement benefits to Company employees and was established and required by the terms of the Plan to be maintained for the exclusive benefit of its employee participants.

Since 1968, Petitioner Bernard Goldstein was the owner and chief executive officer of the Company, as well as one of two Trustees of the Plan. Jack Goldstein, Bernard's brother, was also an employee of the Company and the second Trustee of the Plan. (Pet. App. 4a). Both of them were Plan participants.

BRIL Associates ("BRIL"), formerly known as BRIL Joint Venture, was a District of Columbia partnership established by the Goldstein family in 1978 for the sole purpose of buying real estate in Virginia on which to construct a headquarters building for the Company. BRIL's original partners were Bernard Goldstein, his wife and children. (Pet. App. 4a).

During December 1978, Bernard Goldstein caused BRIL to buy a parcel of undeveloped real estate (the "BRIL land") in Virginia from the Shell Oil Company for $455,789.60. That purchase was financed through a loan from a commercial bank secured by a first mortgage and a second mortgage loan from the seller. (Pet. App. 4a). Through a series of transactions starting in 1979, Bernard Goldstein illicitly converted a total of some $461,000 in Plan assets to or for the benefit of BRIL. (Pet. App. 4a).

In addition to the transfer of Plan assets to the BRIL partnership, Bernard and Jack Goldstein, as Trustees

of the Plan, misappropriated Plan assets from 1980 through 1982 through numerous transactions totalling some $200,000, including diversions to Petitioner Goldstein and the Company. (Pet. App. 4a).

None of the misappropriations of Plan assets to BRIL, Goldstein or the Company was ever the subject of a written loan agreement, and none of the Plan assets so taken was ever repaid to the Plan. Bernard Goldstein admitted his knowledge and understanding of the illegality of his use of Plan assets to purchase and finance the BRIL property. He also admitted that he knew that the non-BRIL misappropriations were illegal.

In March 1983 the Plaintiffs filed suit against Petitioners for refusing to provide them with information concerning their retirement benefits. They also sought an accounting of the Plan's assets and the removal of Petitioner Goldstein as Trustee. Shortly thereafter, the United States Department of Labor ("the Department") also filed suit against Goldstein seeking equitable relief under ERISA, and thereafter the cases were consolidated. In July 1983, Plaintiffs amended their complaint by adding allegations that Bernard Goldstein had engaged in prohibited transactions with respect to the Plan and had breached his fiduciary duties in violation of ERISA. The Plaintiffs also alleged that the Petitioner was civilly liable for violations of Title 18 of the United States Code relating to Racketeer Influenced and Corrupt Organizations ("RICO"), 18 U.S.C. § 1961, *et seq.*

On the basis of uncontested facts, the district court granted the Plaintiffs' and Department's motions for summary judgment on the ERISA issues in favor of the Plan and against Plan Trustees Bernard and Jack Goldstein on September 30, 1983 and January 20, 1984. The judgment held them jointly and severally liable for $976,822.28 and Bernard Goldstein liable for an ad-

ditional $20,999. (Pet. App. 5a). The court entered a second summary judgment in favor of the Plan on July 6, 1984 under RICO and awarded the Plan statutory treble damages against Bernard Goldstein. That same day, the district court entered a remedial order allowing the Plan to offset Goldstein's interest in the Plan against the judgments. (Pet. App. 5a-6a). The judgments against Petitioner Goldstein for his misappropriations of Plan assets far exceeded his interest in the Plan.

The court of appeals affirmed the district court's decision and declared that ERISA, through its inclusion of well settled common law trust principles, allows for a pension plan to offset a trustee's interest in the plan against a judgment running to the plan based on the trustee's embezzlement of assets from the same plan. (Pet. App. 9a).

ARGUMENT

The sole issue raised by the Petitioner in this case is whether the lower courts erred in the application of the admittedly appropriate legal authorities. (Pet. at 14-15).[1] Petitioner acknowledges that both ERISA and common law trust principles allow an employee benefit plan to offset a trustee's interest in the plan in satisfaction of judgments against the trustee for breach of fiduciary duties to the plan. (Pet. at 9). Nevertheless, Petitioner contends that both courts improperly confiscated his interest in the Plan. This fact-bound contention does not warrant review by this Court.

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[1] Petitioner also ostensibly raises the issue of the court of appeals' denial of his motion for reconsideration and refers to this Court's decision in *Agency Holding Corp. v. Malley-Duff Associates*, 483 U.S. ——, 97 L. Ed. 2d 121 (1987). In *Agency Holding Corp.*, this Court set forth a limitations period for civil actions under the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1961 *et seq.* Petitioner, however, has never raised the statute of limitations as a defense in this action below and cannot attempt to raise it at this time.

1. In enacting ERISA, Congress authorized the federal courts to exercise the full range of remedial powers available under trust law to fashion remedies for breaches of fiduciary duty by trustees. ERISA Section 409(a), 29 U.S.C. 1109(a), provides that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title *shall be personally liable to make good to such plan any losses to the plan* resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan to the fiduciary, *and shall be subject to such other equitable or remedial relief as the court may deemed appropriate*, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act. (Emphasis added).

In addition, ERISA Section 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B), authorizes "appropriate equitable relief (i) to redress [ ] violations of [ERISA or of the terms of a plan] or (ii) to enforce any provisions of [ERISA] or the terms of the plan." Moreover, one of ERISA's declared purposes was to protect employees' interest in benefit plans by "providing for approprate remedies, sanctions, and ready access to the Federal Courts." ERISA Section 2(b), 29 U.S.C. § 1001(b).

Congress intended by these provisions to grant to the courts "broad authority to fashion remedies for redressing the interests of participants and beneficiaries." *Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). *Accord, IAM National Pension Fund v. Wakefield Industries, Inc.*, 699 F.2d 1254, 1261 (D.C. Cir. 1983) (ERISA's enforcement provisions have been specifically designed to provide participants and beneficiaries with broad remedies for redressing or preventing violations).

According to ERISA's legislative history,[2] these enforcement provisions were "designed to furnish 'broad remedies for redressing or preventing violations of the Act . . . [including] the full range of legal and equitable remedies available in both state and federal courts.'" *Donovan v. Bierwirth*, 754 F.2d 1049, 1052 (2d Cir. 1985), *quoting* H. Rept. No. 93-533, 93d Cong., 1st Sess. 17 (1973). *Accord, Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978). Congress clearly intended the courts "to draw on principles of traditional trust law . . . 'which provides for broad and flexible remedies in cases involving breaches of fiduciary duty'. . . . Courts also have 'a duty to enforce the remedy which is most advantageous to the participants and most conducive to effectuating the purpose of the trust.'" *Mazzola*, 716 F.2d at 1235, *quoting, Eaves*, 587 F.2d at 462.

2. It is a fundamental principle of trust law that the beneficial interest of a trustee-beneficiary who has misappropriated trust assets may be taken to satisfy the loss to the trust. Moreover, the misappropriation of trust assets by a trustee-beneficiary constitutes an anticipa-

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[2] The objective of ERISA's enforcement provisions is to "make applicable the law of trusts, . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.' 120 Cong. Rec. S-15737 (daily ed., August 22, 1974, remarks of ERISA sponsor Sen. Harrison A. Williams, Jr.) as quoted in *Eaves*, 587 F.2d at 462. *See also Leigh v. Engle*, 727 F.2d 113, 139 (7th Cir. 1984) (ERISA incorporates the trust law remedy of disgorgement of profits earned by a trustee with plan assets "to promote [the plan participants'] interest by removing the fiduciary's incentive to misuse trust assets"); *Free v. Briody*, 732 F.2d 1331, 1337-1338 (7th Cir. 1984) (ERISA Section 409 and its legislative history demonstrate that "Congress intended to codify the principles of trust law with whatever alterations were needed to fit the needs of employee benefit plans."); *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir. 1984) ("[I]t is well-settled that ERISA grants the courts wide discretion in fashioning equitable relief to protect the rights of pension fund beneficiaries . . . .").

tion of the trustee's beneficial interest and extinguishes that interest where the trustee's obligations to the trust exceed the amount of the interest. Bogert, *Trusts and Trustees*, § 191 at 484 (Rev. 2d ed. 1979); III *Scott on Trusts*, § 257 at 2201 (3d ed. 1967). *See also Restatement of Law of Trusts*, § 257. This offset remedy is consistent with ERISA's purpose of providing effective remedies for a fiduciary's breach of duty and is among the traditional trust principles incorporated into the law of employee benefit plans under ERISA. Because it provides a remedy for an employee benefit plan to remedy defalcations committed by a trustee, this principle is not inconsistent with ERISA's anti-alienation provisions. ERISA Section 206(d)(1), 29 U.S.C. § 1056(d)(1), and 26 U.S.C. § 401(a)(13). These provisions were intended to shield a participant's interest in a plan from assignment or alienation by or for the benefit of third parties but not to allow a breaching fiduciary to escape liability to an injured plan. There is no dispute among the lower courts on this issue.

3. A conflict among the lower courts may exist, however, as to the applicability of the anti-alienation provisions to situations where an employee's criminal conduct is directed at an employer. In *St. Paul Fire & Marine Insurance Co. v. Cox*, 752 F.2d 550 (11th Cir. 1985), the court found that Congress did not intend the anti-alienation provisions to create a windfall for employees who engage in criminal acts directed at the employer. It then allowed the employer to garnish funds held in the employer's profit sharing plan. Conversely, the Sixth Circuit in *United Metal Products Corp. v. National Bank of Detroit*, 811 F.2d 297 (6th Cir. 1987), *cert. pet. pndg*, held that ERISA does not allow an employer to take an employee's interest in a plan "due to an employee's fraudulent or criminal conduct directed against an employer." *Id.* at 300. Both of these cases concerned an *employee's* criminal acts against *the employer* rather than a *trustee's*

criminal acts against *the plan itself*. In the instant case, unlike *St. Paul Fire & Marine Insurance Co.* and *United Metal Products Corp.*, the Plan suffered direct injury because of the trustees' unlawful activity. Therefore, the resolution by this court of the apparent conflict between *St. Paul Fire & Marine Insurance Co.* and *United Metal Products Corp.* is irrelevant to the instant petition. Regardless of the scope of the anti-alienation provisions in employer-employee situations, those provisions have never been interpreted to preclude an employee benefit plan from satisfying a judgment against a defalcating trustee by offsetting the trustee's interest in the plan against the judgment.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: September, 1987

APPENDIX

ERISA Section 409(a), 29 U.S.C. § 1109(a) provides that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore any such plan any profits of such fiduciary which have been made through use of assets of the plan to the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deemed appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 41 of this Act.